IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 191 of 2003

Kalyanji Walji Private Ltd ..Appellant

V/s

1. Sortex Limited

2. Maharashtra Hybrid Seeds Co.Ltd.

3. Buhler India Ltd. .. Respondents

Shri G.S.Godbole for Appellant

Shri P.K.Dhakepalkar with S.P.Dalal for Respondent nos.1 and 3

CORAM:ABHAY S.OKA,J.

DATED:14th/15th and

21st February 2005

ORAL JUDGMENT :-

1. This Appeal from order takes exception to the Judgment and Order dated 1st January 2003 passed by the learned Joint Civil Judge, S.D., Thane. By the impugned order the learned trial Judge has answered the issue of jurisdiction against the Appellant original Plaintiff and has ordered return of the plaint filed by the Appellant for presentation to the proper Court.

2. The case of the Appellant company is that Respondent no.1 company is incorporated under the laws of England, carrying on business as manufacturers and dealers in sorting machines used for the purpose the purpose of sorting various products. The Respondent no.3 is an agent of the Respondent nos.1 and the Respondent no.2 company was acting as an agent or representative of the Respondent no.1 in transaction with the Appellant . The case of the Appellant is that the Respondent no.1 was claiming to be a pioneer in colour sorting and were experts in supplying reliable Colour sorting technology and leading manufacturer of Colour sorting machines in the world. On 21st October 1994 the Respondent no.2 wrote a letetr to the Appellant by which the Respondent no.2 offered the sorting machine of the Respondent no.1. On 22nd October 1994 the Appellant wrote a letter to the Respondent no. 2 specifically pointing out requirements of the Appellant. According to the Appellant, the representative of the Respondent no.2 thereafter visited the workshop of the Appellant. There was further correspondence exchanged between the parties. On 16th February 1995 the Appellant sent a letter to the Respondent no.1 and requested Respondent no.1 for submission of offer for the machines. On 22nd February 1995 the Respondent no.1 issued a proforma invoice with prices. On 25th February 1995 the Respondent no.2 sent a letter to the Appellant and represented that the Appellant should proceed to buy

Sortex 3000 machine. Along with letter dated 10th April 1995 sent by the Respondent no.1 by Fax to the Appellant, a Proforma Invoice dated 10th April 1995 was also forwarded. In the plaint there is a reference to further correspondence between the parties. According to the Appellant a letter of credit was opened for buying a sortex machine specifically suitable to the Appellant's requirement and an order was placed by the Appellant from its office at Navi Mumbai. The machine was delivered to the Appellant in the month of February 1997 within the jurisdiction of the Civil Court at Thane and according to the Appellant the machine was installed in the factory premises of the Appellant at Navi Mumbai. It is case of the Appellant that right from installation, the machine started creating serious problems and has not given desired output. Thereafter there was correspondence between the parties and ultimately the aforesaid suit came to be filed in the Court of the Civil Judge, S.D., Thane for a decree directing the Respondents to suply a new machine and in the alternative for refund of price of the machine. There is a prayer made for a decree of damages.

3. The Appellant, therefore, filed a suit against the Respondent praying for following reliefs.

a) that the Defendants be jointly and severally be ordered and directed;

i) to supply to the plaintiff, a new colour sorting machine capable of sorting Gum Arabic of higher capacity output of 200 kgs. in respect of size A; 150 kgs. in respect of size B and 100 kgs. in respect of size B and 100 kgs. in respect of size C per hour per channel respectively;

or

ii)to modify and/or alter the Sortex 3201 model machine supplied to the plaintiff in order to achieve promised output of 200 kgs. in respect of size a 150 kgs. in respect of size B and 100 kgs. in respect of size C per hour per channel respectively and also to sort other products;

b) In an alternate to the prayer (a) above

that the Defendants be jointly and severally ordered and directed; to refund to the plaintiff the sum of Rs.17.32 lakhs (the amount paid by the plaintiff to the defendants plus import duty and other expenses together with interest at the rate of 24% per annum from the date of payments till date) together with further interest at he rate of 24% per annum from the date hereof till payment.

c) that the Defendants be jointly and severally be decreed to pay to the plaintiff a sum of Rs.8,52,57,560-00 together with interest therein at the rate of 24% per annum from the date of filing of this suit till judgment as per the particulars of claim annexed hereto and marked as Exhibit No.VV.

4. A written statement came to be filed by the Respondent no.1. In the said written statement a contention was raised that the Appellant had filed along with the suit an incomplete copy of invoice dated 10th April 1995 and the second page of the said invoice was not produced which records general terms and conditions which were imposed by the Respondent No.1 for sale of the machines to the Appellants. Reliance was placed on condition no.16 on the second page of the said invoice which reads thus :

16. Legal Construction: These conditions and the contract shall be governed by the Laws of England and any dispute shall be subject to the non exclusive jurisdiction of the English Courts.

5. A Written statement was also filed by the Respondent no.3 in which reliance was again placed on

the terms and conditions on page 2 of the invoice dated 10th April 1995.

6. An application was made on behalf of the Respondent nos.1 and 3 for framing and deciding preliminary issue of jurisdiction. A contention was raised that the Court had no jurisdiction to entertain and try the suit. By order dated 19th January 2001 the learned trial Judge disposed of the application by directing that following issues shall be framed as a preliminary issue :

1. Whether this court has jurisdiction to try and entertain the instant suit?

2. Whether the suit is maintainable?

3. What order?

. It is to be noted here that there is no challenge to the said order passed by the trial Court by any of the parties.

7. Both the parties did not lead any oral evidence. The learned trial Judge proceeded to decide the preliminary issues and held that in view of clause 16 of the terms and conditions reflected on the page no.2 the invoice dated 10th April 1995, the jurisdiction of all the courts except the courts mentioned in the said

clause was excluded even though cause of action had arisen between the parties within the territorial jurisdiction of the Court of the Civil Judge, S.D., Thane. He, therefore, directed that plaint filed by the plaintiff be returned for presentation to proper court.

8. Shri Godbole,learned Counsel appearing for the Appellant firstly submitted that it is the case of the Appellant that only first page of invoice dated 10th April 1995 was received by them from the Respondent no.1 by Fax and second page of the same allegedly containing terms and conditions including clause no.16 was never served on the Appellant. He submitted that if it was case of the Respondent no.1 that even page no.2 was received by the Appellant, the Respondent no.1 ought to have led evidence to that effect. He pointed out the pursis filed by the Respondent, roznama of the suit and other documents and submitted that Respondent no.1 was under an obligation to lead evidence and to establish that page 2 of the said invoice was sent to the Appellant by Fax and that the same was duly received by the Appellant. He submitted that as the Respondent did not discharge the burden on them, the court committed an error by proceeding on an incorrect assumption that terms and conditions incorporated the invoice and in particular, condition no.16 was duly proved by the Respondents.

9. Shri Godbole relied upon various judgments. He relied upon judgment of Division Bench of this Court reported in AIR 2002 Bombay page 365 (W.S.G.Cricket Pte.Ltd V/s Modi Entertainment Network and another) as well as the judgment of the Apex Court arising out of the said judgment of the Division Bench. The judgment of the apex Court is reported in 2003(4) SCC page 351 . He also relied upon the judgment of the learned single Judge of this Court reported in 2003(1) Bom.C.R. page 140 (Rhodia Limited and Ors. V/s Neon Laboratories Ltd.) He also relied upon the various other judgments to which reference is made at the a stage.

10. Shri Dhakephalkar, learned Counsel appearing for the Respondent nos.1 and 3 stated that when the arguments were heard on preliminary issue, initially Appellant never disputed that page 2 of the invoice was received by the appellant. He invited my attention to the typed copy of notes of written argument filed by the Appellant on 25th June 2002 and submitted that in the said written argument no grievance was made regarding non receipt of page 2. He submitted that as an afterthought in the supplementary written argument which was filed by the Appellant on 25th October 2002, a contention was sought to be taken that page 2 was not received by the Appellant along with the page 1 of the invoice. He submitted that if it was the case of the Appellant that incomplete fax message was received by the Appellant, it was for the Appellant to lead

evidence to show that page 2 of the fax message was not received. He relied upon clause 16 of the terms and conditions on page 2 of the invoice and submitted that by the agreement between the parties the jurisdiction of the trial Court and all other courts save and except the courts of England has been excluded. He submitted that parties have agreed that contract shall be governed by the laws of England and any dispute arising out of contract shall be subject to the non exclusive jurisdiction of English court. He submitted that clause 16 leaves no doubt that parties intended to exclude the jurisdiction of all the courts save and except the courts in England. He submitted that the learned trial Judge has not committed any error by passing the order returning the plaint. He submitted that even according to the Appellant, the Respondent nos 2 and 3 were agents of the Respondent no.1 and they are claiming through Respondent no.1. He therefore submitted that no interference was called for.

11. Shri Godbole rightly submitted that if his first submission regarding failure to prove service of page 2 on the Appellant is accepted, perhaps the matter will have to be remanded to the trial Court to enable both the parties to lead evidence. In such event, issue will still remain regarding interpretation and effect of clause no.16. The grievance of Mr.Godbole as regards lack of evidence is limited to the question whether it is proved by the Respondent no.1 that page 2

was also received by the Appellant. Both the parties are not seeking to lead evidence on the question whether the clause no.16 is binding on the parties. No case is made out before me that any of the parties desire to lead evidence on the intention of the parties. Therefore, the question regarding effect of clause no.16 will have to be considered in any case and therefore I propose to consider the said issue first.

12. The issue whether the parties to a Civil suit can by an agreement choose one of the courts for adjudication of their disputes is no longer res integra. It is a settled position that when two or more courts have jurisdiction to try the suit, parties can by an agreement choose one of such courts for adjudication of their dispute. If there is an express agreement between the parties to that effect, normally the parties will have to take recourse to filing of the suit in the said agreed Court. The apex Court in the decision reported in 2002(2) SCC page 613 (Shriram City Union Finance Corporation Ltd. V/s Rama Mishra) in para 9 has held thus :

> 9. In the present case the impugned order of the High Court and the order passed by the appellate court arises out of the order passed by the Civil Judge, Bhubaneshwar. We have to keep in mind that there is difference between inherent lack of jurisdiction of any court on

account of some statute and the other where parties through agreement bind themselves to have their dispute decided by any one of the courts having jurisdiction. Thus the question is not whether the Orissa courts have the jurisdiction to decide the respondent's suit but whether the respondent could have invoked the jurisdiction of that court in view of the aforesaid clause 34. A party is bound either by provision of the Constitution, statutory provisions or any rule or under terms of any contract which is not against the public policy. It is open for a party for his convenience to fix the jurisdiction of any competent court to have their dispute adjudicated by that court alone. **In other words, one or more courts have the jurisdiction to try any suit, it is open for the parties to choose any one of the two competent courts to decide their disputes. In case parties under their own agreement expressly agree that their dispute shall be tried by only one of them then the parties can only file the suit in that court alone to which they have so agreed**. In the present case, as we have said, through clause 34 of the agreement, the parties have bound themselves that in any matter arising between them under the said contract, it is the courts

> in Calcutta alone which will have jurisdiction. **Once parties bound themselves as such it is not open for them to choose a different jurisdiction as in the present case by filing the suit at Bhubaneshwar. Such a suit would be in violation of the said agreement**. (Emphasis supplied)

The view taken by all the Courts in India on this aspect is consistent. The courts have also taken a view that if a particular court does not have jurisdiction to decide a dispute, parties by an agreement cannot confer jurisdiction on the said Court. (Emphasis supplied)

.15th February 2005.

13. On this point it will also be necessary to refer to the judgment of the apex Court in the decision reported in the case of British India Steam Navigation Co. Ltd. V/s Shanmughavilas Cashew Industries and Ors reported in (1990) 3 SCC 481. Paragraph nos 17 and 28 are relevant paragraphs of this judgment which read thus:

> 17. According to the authors the parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them. The chosen court may

be a court in the country of one or both the parties, or it may be a neutral forum. The jurisdiction clause may provide for a submission to the courts of a particular country, or to a court identified by a formula in a printed standard form, such as a bill of lading referring disputes to the courts of the carrier's principal place of business. It is a question of interpretation, governed by the proper law of the contract, whether a jurisdiction clause is exclusive or non exclusive, or whether the claim which is the subject matter of the action falls within its terms. If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law.

28. Clause 3 of the bills of lading also contains the selection of law made by the parties. The contract is governed by English law and disputes are to be determined according to English law. Is the selection of law binding? In Cheshire and North's Private International Law (11th edn. page 495), while discussing about the interpretation of contracts the authors say :"When the stage has been reached where an obligation, formally and essentially valid and binding on parties of

> full capacity, has been created, then in the further matters that may require the intervention of the court, there is, speaking generally,no reason in principle why the parties should not be free to select the governing law". The express choice of law made by parties obviates need for interpretation."

14. The counsel appearing for the parties have extensively referred to the judgment of a Division bench of this Court reported in AIR 2002 (Bom) 365 -W.S.G.Cricket Pte.Ltd. V/s Modi Entertainment Network and another . The Division Bench was dealing with an appeal preferred by the original defendant. The appeal was preferred against an ad-interim injunction granted against the Appellants from proceeding with or taking any steps in the claim filed by the Appellant in the High Court of Justice , Queen’s Bench Division,England. The prayer was for anti suit injunction. There was a contract between the parties by which the defendant i.e. Appellant before the Division Bench was granted exclusive licence for, inter alia, television rights in respect of ICC Knockout Cricket Tournament at Kenya held in October 2002. One of the relevant clauses of the agreement between the parties was clause 12 which read thus :-

> 12. English Law.

> This agreement shall be governed by and construed in accordance with English Law and the parties hereby submit to the non exclusive jurisdiction of the English Courts (without reference to English conflict of law rules).

15. The Appellant before the Division Bench alleged breach of contract and filed its claim in the High Court of justice, Queen's Bench Division, England. Notice of Motion was taken out by the Respondents before the Division Bench for temporary injunction restraining the Appellant from prosecuting the claim made in the High Court of Justice, Queen's Bench, England. The Division bench proceeded to set aside the ad-interim order granting injunction. Shri Godbole, learned Counsel appearing for the Appellant has taken me through the various paragraphs of the Judgment of the Division Bench. There is a decision of the apex Court reported in (2003) 4 SCC page 341 (Modi Entertainment Network and anr. V/s W.S.G.Cricket Pte. Ltd.)- which was delivered in Special Leave Petition filed for challenging the aforesaid judgment of the Division Bench. The apex Court upheld the order of the Division Bench. In paragraph 11 of the judgment of the apex Court. It is held that :

> "In regard to jurisdiction of courts under the Code of Civil Procedure (CPC) over a subject

matter one or more courts may have jurisdiction to deal with it having regard to the location of immovable property, place of residence or work of a defendant or place where cause of action has arisen. Where only one court has jurisdiction, it is said to have exclusive jurisdiction; where more courts than one have jurisdiction over a subject matter, they are called courts of available or natural jurisdiction. The growing global commercial activities gave rise to the practice of the parties to a contract agreeing before hand to approach for resolution of their disputes thereunder, to either any of the available courts of natural jurisdiction and thereby create an exclusive or non exclusive jurisdiction in one of the available forums or to have the disputes resolved by a foreign court of their choice as a neutral forum according to the law applicable to that court. **It is a well settled principle that by agreement the parties cannot confer jurisdiction, where none exists on a court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non exclusive jurisdiction of a foreign court; indeed in such cases the English courts do permit invoking their jurisdiction. Thus, it is clear that the**

parties to a contract may agree to have their disputes resolved by a foreign court termed as a "neutral court" or "court of choice" creating exclusive or non exclusive jurisdiction in it" (Emphasis supplied)

16. The apex Court has summarised the legal position in paragraph no.24 of the said judgment. Some of the principles summarised in paragraph no.24 relate to grant of anti suit injunction. We are however concerned with clause nos 3 and 5 and 6 of paragraph no.24.

> "24. From the above discussion the following principles emerge :

(1) x x x

(2) x x x

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or **non exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case**.

(5). Where parties have agreed, under a non exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti suit injunction will be granted in regard to proceedings in such a forum convenience and favoured forum as **it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum**. (Emphasis supplied).

17. After laying down the aforesaid principles and after adverting to the relevant clause in the contract, the Apex court in paragraph no.26 held as under :-

> 26. A plain reading of this shows that the **parties have agreed that their contract will be governed by and be construed in accordance with English law and they have also agreed to submit to the non-exclusive jurisdiction of English courts (without reference to English conflict of law rules). We have already observed above that recitals in regard to submission to exclusive or non exclusive jurisdiction of a court of choice in an**

agreement are not determinative. However, as both the parties proceeded on the basis that they meant non exclusive jurisdiction of the English courts, on the facts of this case, the court is relieved of the interpretation of the jurisdiction clause. Normally, the court will give effect to the intention of the parties as expressed in the agreement entered into by them except when strong reasons justify disregard of the contractual obligations of the parties.

(Emphasis supplied)

18. In paragraph no. 27 the apex Court considered the scope of power to grant anti suit injunction. While dealing with the power to grant anti suit injunction the apex Court held as follows...It is true that the courts would be inclined to grant anti-suit injunction to prevent breach of contractual obligation to submit to the exclusive or non exclusive jurisdiction of the court of choice of the parties but that is not the only ground on which anti suit injunction can be granted.As is apparent, the appellants brought the suit in the court of natural jurisdiction for adjudication of the disputes arising under the contract for which the parties have agreed to submit to the non exclusive jurisdiction of the English Court in accordance with English law though the English Court has no nexus with

the parties or the subject matter and is not the natural forum. **But then the jurisdiction clause indicates that the intention of the parties is to have the disputes resolved in accordance with the principles of English law by an English court. Unless good and sufficient reasons are shown by the appellants, the intention of the parties as evidenced by their contract must be given effect to.** Even when the appellants had filed the suit earlier in point of time in the court of natural forum and the respondent brought action in the English Court which is the agreed forum or forum of the choice having regard to the expressed intention of the parties,no good and sufficient reason in made out to grant anti suit injunction to restrain the respondent from prosecuting the English action, as such an order would clearly be in breach of agreement and the court will not, except when proceedings in a foreign court of choice result in perpetuating injustice aid a party to commit breach of the agreement. ....." (Emphasis supplied).

19. In so far as the present appeal is concerned, it is necessary to refer to relevant clause no.16 in the invoice dated 10th April 1995. The said clause reads thus :

> 16. Legal construction : these conditions and the contract shall be governed by the laws of England and any dispute shall be subject to

the non exclusive jurisdiction of the English Court."

20. The trial Court has interpreted the said clause and has come to the conclusion that the jurisdiction of the Civil Judge, Senior Division, Thane has been ousted. The trial Court has placed reliance on the judgment of the apex Court reported in AIR 1989 SC Page 1239 (ABC Laminate Pvt. Ltd. and Ors. V/s A.P.Agencies, Salem).

21. In the case of British India Steam Navigation Co.Ltd. (Supra), in paragraph no. 17 which is quoted above, the Apex Court noted that parties to a contract in international trade or commerce may agree for the jurisdiction clause which may provide for a submission of the disputes to the courts of a particular country, or to a court identified by a formula in a printed standard form. The Apex Court observed it is a question of interpretation governed by the proper law of the contract, whether a jurisdiction clause is exclusive or non exclusive, or whether the claim which is the subject matter of the action falls within its terms. The Apex Court held that if there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law. In paragraph 28 of the said decision, the Apex Court referred to clause no.3 of the bill of lading which also contained the

selection of law made by the parties. The contract was to be governed by the English law and disputes were to be determined according to English law. While examining the question whether the selection of law was binding on the parties, the apex Court referred to Cheshire and North's Private International law and held that express choice of law made by parties obviates need for interpretation. In paragraph no.31, the apex Court held that where there is no express choice of the proper law, it is open to the Court to determine whether there is an implied or inferred choice of law in the contract.

22. In case in hand, assuming that clause no.16 of the invoice is binding on the parties, by the said clause the parties have expresslly agreed that contract between them shall be governed by the law of England. In so far as law which governs contract is concerned the need for interpretation has been obviated due to stipulation in clause no.16.

23. At this stage it will be necessary go back to the judgment of the Apex Court in case of Modi Entertainment Network and Anr. (supra). In paragraph no. 11 the Apex Court has reiterated the well settled principle that by agreement the parties cannot confer jurisdiction, where none exists, on a court to which the Code of Civil Procedure, 1908 applies. The Apex Court however expressly held that this principle does

not apply when the parties agree to submit to the exclusive or non exclusive jurisdiction of a foreign court. The Apex Court further held that in such cases the English courts do permit invoking their jurisdiction. Therefore the apex Court recognised that the parties to a contract may agree to have their disputes resolved by a foreign court termed as a neutral court or court of choice creating exclusive or non exclusive jurisdiction in it. In view of what is held by the apex Court, though the courts in England may not have jurisdiction to entertain the disputes between the parties to this appeal, the parties can agree to submit themselves to exclusive or non exclusive jurisdiction of English Courts. As held by the Apex Court in the said decision, the English Courts do permit invoking their jurisdiction. Thus the apex Court has carved out an exception to the general rule that parties cannot confer jurisdiction on a court in which the jurisdiction does not exist.

24. In paragraph no.24 of the judgment of the Apex Court, it is held that where a jurisdiction of the Court is governed on the basis of the clause relating to the jurisdiction in the contract, the recitals in the contract as regards exclusive or non exclusive jurisdiction of the Court of chocie of the parties are not determinative. The apex Court held that it will have to be presumed that the parties have thought over their convenience and all other relevant factors before

submitting to the non exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum. In paragraph no. 26, the apex Court proceeded to interpret the relevant jurisdiction clause in the contract in dispute before it. The said clause is similar to clause with which I am concerned in this appeal. In the jurisdiction clause which was dealt with by the Apex Court, the following portion in bracket "without reference to English conflict of law rules" is not found in the jurisdiction clause in the present case. It is held in the said decision that recitals in regard to the submission to exclusive or non exclusive jurisdiction of a court of choice in an agreement are not determinative. Considering the fact that the clause interpreted by the Apex Court and the clause no.16 which is the subject matter of Appeal is in substance the same, the reference to 'not exclusive jurisdiction of English Courts' is not determinative. The apex Court also held that normally the court will give effect to the intention of the parties as expressed in the agreement entered into by them except when strong reasons justify disregarding the contractual obligations of the parties. In paragraph no. 27, the Apex Court stated that when the jurisdiction clause indicates that the intention of the parties is to have the disputes resolved in accordance with the principles of English law by an English court, unless good and sufficient reasons are shown by the Appellants, the intention of the parties as evidenced

by their contract must be given effect to.

25. In so far as clause no.16 in the present case is concerned, there is a clear stipulation that the parties have agreed that contract shall be governed by laws of England. The clause further recites that any dispute shall be submitted to the non exclusive jurisdiction of English Court. As held by the apex Court in Modi Entertainment Network (supra), the use of the words "non exclusive jurisdiction' is not determinative and what is determininative is the intention of the parties. The intention of the parties is very clear that the contract will be governed by the law of England and any dispute arising out of the contract shall be subject to non exclusive jurisdiction of English courts. Thus assuming that clause no.16 is binding on the parties, the intention of the parties appears to be expressly clear to that effect.

21st February 2005

. The reference in clause to "non exclusive jurisdiction" is obviously to English Courts having non exclusive jurisdiction. A clear intention of the parties is reflected that the contract will be governed by English law and the court of non exclusive jurisdiction in England will alone have jurisdiction to entertain a dispute arising out of contract.

26. I have already referred to the judgment of the apex court in the case reported in 2002(2) SCC page 613 (Shriram Union Finance Corporation Ltd (supra). It is held in the said decision that a suit filed in violation of agreement between the parties as regard place of filing the suit is not a valid suit. Therefore, in my view if clause no.16 is shown to be part of the agreement between the parties which is binding on both the parties, the suit will not be maintainable in the court of Civil Judge, S.D., Thane and to that extent the view taken by the learned trial Judge is orrect.

27. This takes me to the next argument advanced by Shri Godbole, the learned Advocate for the Appellant. He states that page 2 of the Invoice containing clause no.16 was not received by the Appellant plaintiff. Both the parties have filed their respective pursis in the trial Court stating therein that they do not desire to lead any evidence. The contention of the learned Counsel appearing for Respondent nos.1 and 3 is that initially the parties proceeded on the footing that even the plaintiff Appellant has received the complete copy of the Exh.N annexed i.e. the invoice dated 10th April 1995 to the plaint and only in supplementary written argument the contention regarding non receipt of page 2 containing the relevant clause was raised by the Appellants plaintiff. In my view, the question

whether clause no.16 was part of the agreement of concluded between the parties is a jurisdictional fact which was required to be decided with a view to decide the question of territorial jurisdiction. For the purpose of deciding the issue of jurisdiction, it was also necessary to decide the dispute between the parties as regards alleged non receipt of page 2. Pursis dated 16th January 2002 filed on behalf of the Respondent nos.1 and 3 at Exh.35 states that as Plaintiff Appellant through their learned Advocate admitted the document no.1 filed along with the list of Document, the Respondents defendants did not wish to lead oral evidence in support of the preliminary issue. Placing reliance on the said pursis it was sought to be argued that page no.2 containing clause no.16 was admitted by the plaintiff. However, I find that there is no such admission by the Appellant.

28. Though it is not specifically stated in the plaint that page 2 of the invoice was not received, it is case of the defendants in the written statement that complete invoice containing the relevant terms and conditions was received by the plaintiff Appellant and the Appellant has deliberately annexed only the first page of the invoice. If the plaintiff Appellant had received the said page 2 and if the plaintiff Appellant at no stage had informed the defendants that he was not agreeable with any of the terms and conditions as stipulated in page 2, it is obvious that clause no.16

on the said page will bind the parties, and the Appellant will have to file suit in the Court which is agreed upon the parties.

29. Even in the notes of the written argument which was initially filed on behalf of the Appellant it was not admitted that page 2 was received by Fax. No doubt it refers to clause no.16. The reference to clause 16 in the submission is naturally in the context of the submission made by the Respondents. The fact remains that before the impugned order was passed supplementary written argument was filed in which the Appellant plaintiff specifically contended that page no.2 was never transmitted to the Plaintiff Appellant. Therefore there was no admission on record made by the Appellant that the second page was received. Thus it was for the Respondents to lead evidence to establish that relevant page was transmitted to the plaintiff Appellant and was in fact received. The Pursis of evidence closed by the Defendant nos 1 and 3 is signed by their Advocate. It is obvious that Pursis was filed by the said Advocate under incorrect impression that document in question is admitted by the plaintiff. The supplementary argument was on record and the impugned order does not show that learned Judge has dealt with the same. Though supplementary written argument was filed after pursis dated 16th January 2002 was filed by the Respondent nos.1 and 3, the said Respondents could have applied to the Court for grant of permission to

lead evidence in the light of the contentions raised in the supplementary written arguments.

30. Therefore, in my view, it was necesasry for the trial Court to decide the question whether the relevant page was transmitted to the Appellant and was received by the Appellant. The trial Court was required to give a decision on the said point before deciding the preliminary issue.

31. In this view of the matter, the impugned order will have to be quashed and set aside and the matter will have to be remanded to the trial Court. In so far as the effect of the clause no.16 is concerned, it being the question of law, I have decided with same. I have held that if the said clause was incorporated in the binding contract between the parties, the suit filed by the Appellant in the trial Court was not maintainable. Thus after remand if the trial Court finds that page no.2 containing clause no.16 was received by the Appellant and was binding on the Appellant, the plaint will have to be returned for presentation to proper Court. The order of remand will be only for considering the question whether the page containing the clause no.16 was received by the Appellant and was binding on the Appellant.

32. In this view of the matter, I pass the following order :-

i. Subject of the observations made above, impugned Judgment and order is quashed and set aside and the matter is remanded to the learned trial Judge for deciding the issue of jurisdiction afresh in the light of law laid down in this judgment.

ii. Parties will appear before the learned trial Judge on Monday the 28th March 2005 at 11-00 a.m.

iii. The learned trial Judge permit both the parties to lead evidence on the question which is indicated in paragrpah nos.30 and 31 of this judgment.

iv After permitting the parties to lead evidence, the preliminary issue will be decided in the light of what has been held in this judgment.

v. The trial Court will permit the parties to lead evidence and will pass the order on or before 31st August 2005.

vi. Appeal is partly allowed in above terms with no order as to costs.

. Parties and the concern Court will act on an authenticated copy of this order.

(A.S.OKA,J.)